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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 57

RAILROAD COMMISSION OF TEXAS, ET AL., *Appellants,*

v.

HUMBLE OIL & REFINING COMPANY, *Appellee.*

APPELLEE'S REPLY TO APPELLANTS' MOTION TO ADVANCE AND FOR EXTENSION OF STAY PENDING APPEAL

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To the Honorable Supreme Court of the United States:

Now comes appellee, Humble Oil & Refining Company, and respectfully says:

I.

Appellee does not contest appellants' request that this action be advanced for argument and hearing, and hereby joins in such request, with the proviso that a reasonable opportunity be afforded to the appellee to file its written brief.

II.

This action is here on appeal from a final judgment

of a statutory three-judge court finding the plan of proration of the Railroad Commission of Texas in vogue in the East Texas Oil Field to be unreasonable, discriminatory, confiscatory and void as to appellee and to be violative of its rights under the due process and equal protection clauses of the 14th Amendment, and permanently enjoining appellants from enforcing such plan of proration against appellee. There was a delay of about thirty days after the court announced its decision before the final judgment was entered. Upon entering the final judgment the court granted a stay of enforcement of the injunction for sixty days thereafter.

Appellee respectfully shows that no further stay should be granted, and that the portion of appellants' motion asking for further stay should be denied or dismissed for the following reasons:

1. The motion for extension of the stay is insufficient and does not offer to do equity because it does not suggest or offer any method by which appellee's rights may be protected during the stay.

2. The allegations upon which appellants base their motion for extension of the stay are highly speculative and conjectural at best. They are at most mere conclusions of the pleader with no facts shown to support them. Appellee specifically denies: that appellants will suffer any injury if a stay is denied; that a further stay is necessary in order to prevent serious and irreparable injury to the East Texas Oil Field; that appellee will not suffer any irreparable injury from a continuation of the present method of

prorating the East Texas Field pending this appeal; that the damage and injury which will result to appellee as a result of a further stay will be greatly outweighed by the injury which will be done to appellants and to other operators in the East Texas Field and to the oil industry in the State of Texas as a whole if the stay is not extended; and that a stay is necessary in order to prevent inequality between operators in the field.

3. Appellant, the Railroad Commission of Texas, is a public administrative agency and the other appellants are public officials of the State of Texas. They will not suffer any injury whatsoever by enforcement of the judgment. Appellee has never sought and does not now seek to produce more than its fair share of the oil currently produced from the field. If the stay is denied appellee will not produce in excess of that amount. No one can suffer as a result of the production by appellee of its fair share.

4. The trial court has found that the orders complained of are unreasonable, confiscatory and void as to appellee; that they daily cause large and irreparable injury to appellee; and that appellee has no adequate remedy at law. Consequently, appellee will suffer great and irreparable injury if a further stay be granted. In support of the statements just made, the record not yet being printed, appellee attaches hereto as Exhibit "A" a true copy of the Findings of Fact and Conclusions of Law filed by the three-judge trial court. Briefly, among other things, the Findings show that the orders attacked fixed a top

field allowable of 691,000 barrels of oil for each producing day; that 509,000 barrels, or approximately 75 per cent of the whole, is arbitrarily distributed on the basis of 20 barrels per well per day to each well in the field capable of producing that amount; that less than 1 per cent of the field allowable is allocated to the so-called marginal wells, incapable of producing 20 barrels per day; that about 176,000 barrels per day, or about 25 per cent of the field allowable, is allocated among all except marginal wells in the field on a formula which considers potential, bottom hole pressure, sand thickness and acreage, the amount allocated to each well under the formula being in addition to the flat 20 barrels per well. (Findings of Fact, paragraphs 18 and 19, pp. 25 to 27 hereof.) The court below expressly found that appellee owns at least 14.3 per cent of the recoverable oil reserves in the field, but is allowed under the proration orders to produce only 11.17 per cent of the scheduled allowable and only 11.11 per cent of the current actual allowable; that appellee is being currently deprived of an opportunity to produce 3.13 per cent of the current scheduled allowable or 3.19 per cent of the current actual allowable, this being 29 per cent of the allowable appellee is permitted to produce (Findings of Fact, paragraph 21, pages 27, 28 hereof); that the confiscation and discrimination complained of result almost entirely from the use of the 20 barrel minimum, and no good reason is shown why such minimum is necessary, and if the entire field allowable were apportioned according to the formula in the proration

orders, with no per well minimum, appellee's properties would be permitted currently to produce slightly in excess of 14.3 per cent of the current field allowable (Findings of Fact, paragraph 22 (a), page 28 hereof); that the arbitrary allocation of approximately 75 per cent of the field allowable on a flat 20 barrel per well basis bears no relation to the prevention of physical waste, and is not justified by the necessities of the case (Findings of Fact, paragraph 24, page 31 hereof); that appellee has drilled enough wells on its leases to recover efficiently, without waste, the recoverable oil on its leases, and to produce its proper share of the allowable; that the per well method of distribution tends to cause waste, as a result of concentrated withdrawals in areas of dense drilling (Findings of Fact, paragraph 25, pages 31, 32 hereof; that plaintiff has repeatedly and diligently sought administrative relief (Findings of Fact, paragraph 28, page 33 hereof); that the present proration method results "in the taking of plaintiff's property and giving it to others without any compensation and without any reasonable necessity," and "plaintiff is deprived of a reasonable opportunity to produce currently a very substantial quantity of oil which it would be entitled to produce under a proper method of regulation"; that the "loss to plaintiff under such a program amounts to a very large figure daily" (Findings of Fact, paragraph 29, pages 33, 34 hereof); that the present plan of proration enforced by the Commission does not distribute the allowable on a reasonable basis, and "is arbitrary, discrimin-

atory, confiscatory, and unreasonable as applied to plaintiff" and "denies to plaintiff a reasonable opportunity to recover its fair share of the oil ultimately, much less within a reasonable time, resulting in a daily loss of many thousands of barrels of oil worth many thousands of dollars." (Findings of Fact, paragraph 30, page 34 hereof.) The court below further found, "there is nothing in the orders or program of the Commission which even suggests that the losses already incurred by plaintiff, and to be incurred by the present program, can or will be offset by increasing the allowable of the plaintiff in the future in order to make up for any losses which have occurred or may hereafter occur." (Findings of Fact, paragraph 29, pages 33, 34 hereof.)

The trial court concluded "plaintiff is currently suffering an immediate and irreparable injury * * * and, so long as such program is maintained in force and effect, it will continue to suffer irreparable injury, unless the defendants are enjoined * * *"; that plaintiff is without an adequate remedy at law (Conclusions of Law, paragraph 9, page 37 hereof); that "the record shows virtually no dispute as to the facts." (Conclusions of Law, paragraph 12, page 39 hereof.)

The above findings that plaintiff is daily suffering great and irreparable injury under the present order and has no adequate remedy at law, made by the three-judge court after trial on the merits, should outweigh appellants' representation to the court that the contrary is true; particularly in view of the state-

ment by the court that there was virtually no dispute as to the facts.

5. Discrimination has been created by the Commission's order, and, therefore, a further stay of the judgment would continue the existing inequity; whereas, enforcement of the judgment would correct great inequity as to appellee according to the trial court's express findings. The judgment does not create inequities as to other operators. The vice is in the order enjoined. No inequity to others can result from permitting appellee to produce what it has shown in a trial on the merits to be its fair share. Only the Railroad Commission has the power to rewrite its order so as to eliminate the inequities, if any there be, as to other operators. The judgment in this action can correct inequity only as to the immediate parties. The Railroad Commission's refusal to eliminate inequities, if any there be as to others, is no basis for denying to appellee immediate relief from the discrimination and confiscation it is suffering. The fact that there may be others suffering inequities who have not seen fit, as appellee has done, to protect themselves by proper legal action, should be no excuse for denying to appellee relief which it has clearly shown itself entitled to receive. Furthermore, since the Railroad Commission has the power in its own hands to cure inequities, if any there be as to others, there can be no reason for further stay as to appellee. Whether the judgment is or is not stayed, a large number of other operators who, under the trial court's findings, are being favored by the present

plan of proration, will continue to receive more than their fair share during the appeal; but a further stay would give them a greater advantage over appellee than they would have if the stay is not extended.

The possibility that there may be other operators who are injured by the Commission's orders and that they may seek injunctions against enforcement of the orders as to them does not furnish sufficient reason for extending the stay. The assumption that they will file suit is wholly speculative. Only two other operators have filed suit, although the orders complained of have been in effect since September 11, 1939. At all events, the appellants are not in position to complain of such inequities, because, if they exist, they have been created by the Railroad Commission; and the Commission has the power, even if the extension of the stay be denied, voluntarily to correct discriminations as to others. However, since the appellants admit that such inequities exist, no good reason is perceived why injured persons should not seek relief against orders which are admittedly discriminatory, whether the stay is granted or not.

6. If the stay is extended appellee will suffer irreparable injury to the extent of many thousands of dollars daily. Appellants suggest no way to protect appellee against such losses. There is a way open to appellants whereby appellee and all other operators in the field similarly situated can be protected against discrimination and confiscation pending the appeal without rendering the appeal moot. This action involving matters of public concern, the Rail-

road Commission has it within its power to issue a temporary order pending appeal of this action providing a method of allocation which will afford to appellee and all other operators similarly situated an opportunity currently to recover their fair share of the oil. The trial court has found "that without using the per well minimum, the factors employed can be given such values in a formula that a reasonable method of distribution can be effected." (Findings of Fact, paragraph 22 (a), page 28 hereof.) The factors referred to were potential, pressures, sand thickness and acreage. Such a temporary order would eliminate such inequities as may exist, remove the alleged threats of serious injury to the field and the oil industry as a whole, and do away with the alleged uncertainty and confusion and the alleged threat of a multiplicity of suits. The writing of such a temporary order lies within the exclusive power of the Railroad Commission. It has in its hands the only means of completely eliminating all possibility of inequities pending appeal. The mere fact that the Railroad Commission is unwilling to do away with such discriminations and confiscation of its own accord pending the appeal does not furnish ground for a further stay.

7. Since the granting of a further stay is not necessary in order to preserve the subject matter involved in this action, or to protect defendants from irreparable injury, but since a further stay would cause irreparable injury to appellee, as is shown above, it

is clear that the balance of convenience is in favor of appellee.

8. The trial court refused to grant a stay exceeding sixty days in duration.

III.

Appellee has diligently cooperated with appellants in perfecting their appeal, and will continue to cooperate diligently in obtaining an early disposition of this action.

WHEREFORE, appellee joins in appellants' prayer that this action be advanced for argument and hearing, but respectfully prays that the enforcement of the judgment below be not further stayed, that Appellants' Motion for Extension of Stay pending appeal be dismissed, and for such further relief as may be just and proper.

Respectfully submitted.

Rex G. Baker

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Acknowledgment of Service of Reply.

Service of the forgoing reply is acknowledged by the undersigned attorney for the appellants, this .....day of April, A. D. 1940.

.....

Attorney for the Appellants.

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EXHIBIT A

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CIVIL ACTION No. 31

HUMBLE OIL & REFINING COMPANY, *Plaintiff*,
v.
RAILROAD COMMISSION OF TEXAS ET AL., *Defendants*.

Findings of Fact and Conclusions of Law.

As required by Rule 52(a) of the Federal Rules of Civil Procedure, the court of three judges (consisting of Sibley, Circuit Judge, and McMillan and Allred, District Judges) makes the following as its findings of fact and conclusions of law in the above numbered and entitled action, and the court directs that the Clerk of this court file such findings and conclusions as part of the record in this action.

A

Findings of Fact.

I.

Parties and Jurisdiction.

1. Plaintiff is a private corporation, duly organ-

ized and existing under the laws of the State of Texas, with its principal place of business in Harris County, Texas.

2. The Railroad Commission of Texas is domiciled in Travis County, Texas, and is the duly created and existing agency of the State of Texas, charged with the administration of the laws of the State of Texas governing the conservation of oil and gas and the production thereof. Defendants, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, are the duly elected, qualified and acting members of and compose the Railroad Commission of Texas. Their official residences are in Travis County, Texas. Defendant Gerald C. Mann is the duly elected, qualified and acting Attorney General of Texas, with his official residence in Travis County, Texas. Proper notice of this action has been given to the Governor and the Attorney General of Texas, and proper service of process has been had upon all of the defendants. Furthermore, the defendants have filed their answer to the original and supplemental complaints.

3. This is a civil action. The amount in controversy exceeds $3000.00, exclusive of interest and costs. In this action, plaintiff has attacked certain orders of the Railroad Commission of Texas fixing top allowables and prorating the allowable production among properties in the East Texas field on the ground that such orders as construed, applied and enforced against the plaintiff are without authority at law and are in contravention of the due process and equal

protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The plaintiff asked for preliminary injunctions in its original and supplemental complaints, and hearings were had and judgments entered on motions for preliminary injunctions before three-judge statutory courts, and the action was subsequently tried on its merits before a three-judge statutory court. Such statutory courts were duly constituted and assembled under Section 266 of the Judicial Code, as amended.

II.

General Geologic Description of the East Texas Reservoir.

5. The East Texas field is one huge reservoir embracing originally some 133,000 acres of land and at present including some 131,330 acres of land situated in Rusk, Gregg, Smith, Cherokee and Upshur Counties, Texas; the field is approximately 40 miles long north and south, and averages about 4 miles wide east and west. The reservoir is in the Woodbine sand at an average depth of some 3,650 feet below the surface. In it the oil is confined by an impervious formation (Austin chalk) above, and an impervious formation (Georgetown lime) and water below. A cross section of the field extending from west to east has the shape of a vast obtuse-angled triangle, with one of the short sides (westward) of the triangle resting on the water table as a base, with the other short side of the triangle (being a portion of the imper-

vious bed of Georgetown lime) extending eastward and upward, and with the longest or top side extending from the point of contact between the oil, the water and the impervious roof on the west side of the structure, along such roof upward and eastward to the eastern extremity of the field. On the extreme west edge the oil-saturated portion of the sand is very thin, being less than a foot or so in thickness; going eastward, it gradually increases in thickness to the middle of the oil-saturated portion of the reservoir or the so-called "fairway," where the oil sand attains a maximum thickness of about 90 to 100 feet; then the oil-saturated sand gradually decreases in thickness until it is pinched out and vanishes on the east edge of the field. The Woodbine sand extends in a westerly and upward direction from the field to an outcropping some 100 to 150 miles west and northwest of the field. Underlying approximately the west half of the oil-bearing sand and extending westward and upward to the outcropping is a vast amount of salt water occupying practically all of the Woodbine sand except that occupied by oil and gas. This salt water exerts pressure against the oil and gas in the reservoir. The pressure originally was some 1650 pounds per square inch, but as the field has been produced the pressures have been reduced, and a pressure gradient has been built up across the field from west to east ranging from an average of nearly 1200 pounds per square inch on the west to an average of about 900 pounds per square inch on the east. The pressure of the water is the principal source of reservoir energy. As wells are drilled into

the producing sand, the reservoir pressures and the expansion of the gas in solution in the flowing wells, force the oil to the surface through the wells, thus affording the energy by which the field is produced. With respect to pumping wells, artificial means must be used to lift the oil to the surface. The differential in pressures from west to east tends to drive the oil, as the field is produced, from west to east.

6. Gas is dissolved in the oil and will not come out of solution until pressures are reduced to approximately 750 pounds per square inch on the average. The presence of the dissolved gas makes the oil less viscuous, and materially increases its capacity to move through the pore spaces in the sand. If pressures are so reduced that gas comes out of solution, it will form bubbles in the producing sands and the oil will become more viscuous, thus materially impairing the ability of the oil to flow through the sands. Gas has already come out of solution in a small area in the southeastern portion of the field.

7. Furthermore, experience has shown that the field cannot for any extended period produce at a rate materially in excess of 400,000 barrels of oil per day without causing waste, considering that an average of about 200,000 barrels of water daily are currently being produced from the field with about 400,000 barrels of oil. If the top allowable for the field is placed too high, the reservoir pressure will drop rapidly and create conditions conducive to waste; and, considering the varying densities to which properties in the field have been drilled, there will be non-ratable withdraw-

als from the field, if much of the allowable be prorated on the per-well or per-well potential basis, or any basis giving too much value to wells or potentials, thus resulting in an uneven or irregular rise of the water table. This will cause large quantities of oil to be trapped off or enveloped by what is known as coning or channeling of the water, and will greatly reduce the ultimate recovery from the field, thus causing physical waste.

8. The Woodbine sand, in which the oil and gas are found in the field, is a very porous and highly permeable sand; there is intercommunication between all parts of the reservoir, thus permitting rather free movement of oil and gas from one portion of the reservoir to another. The fluids flow from areas of higher to areas of lower pressure, thus resulting not only in local migration, but also in a general movement or encroachment upward and eastward of water from the west, being a normal movement in the light of the pressure gradient across the field, high on west, lower in the east. A well drilled into the reservoir and operated under proper conditions of control of reservoir pressure will effectively drain an area of at least ten acres.

9. The number of acre-feet of net effective oil sand in the field, or in a lease in any portion of the field, can be determined actually and relatively with reasonable accuracy by taking into consideration such factors as the number of acres of land in a lease and the average thickness of the net oil sand under the lease. It is likewise possible to determine with reasonable ac-

curacy, actually and relatively, the quantity of oil per acre-foot of net effective oil sand, and the quantity of recoverable oil in the field and in the various leases in the field assuming the conditions under which the field is to be operated.

III.

Extent and Location of Plaintiff's Properties.

10. Plaintiff owns leases covering approximately 14,656 surface acres of land within the producing limits of the field. Such leases comprise approximately 11.4 per cent of the producing acreage within the field. Some of its leases lie in the western portion and some in the eastern portion; but most of its leases are situated along a line running in a northerly and southerly direction near the middle of the field; that is, for the most part, its leases are located in the so-called "fairway," or that portion of the field where the producing sands have the greatest thickness and largest quantity of recoverable oil in place.

IV.

The Oil Reserves in the Field and Under Plaintiff's Leases.

11. Plaintiff's leases originally contained approxi- 14.3 per cent of the acre-feet of net oil sand in the field. The average thickness of the net oil sand under plaintiff's leases was 48.29 feet, while the average thickness of the net oil sand under the field as a whole was 37.78 feet.

12. Competent petroleum engineers and geologists will agree fairly well concerning the amount of oil per acre-foot of net oil sand in place in the East Texas field. The percentage of the oil which can be recovered per acre-foot depends upon the manner in which the individual wells and the field as a whole are operated. If a proper allowable for the field and ratable production are maintained, a higher rate of recovery per acre-foot may reasonably be expected than if the allowable for the field is excessive, or if excessive localized withdrawals are permitted. The opinions of competent engineers and geologists may vary as to what the actual rates of recovery per acre-foot in the field will be in the future, due in part to their differences in assumptions as to the conditions under which the field may hereafter be operated. Such possible variances in recovery figures would not materially change the percentage of the total volume of recoverable oil in the field which lies under plaintiff's leases. Whether the rate of recovery per acre-foot in the field be high, medium, or low, plaintiff's percentage of the oil actually recovered (by itself or others) should not vary materially, due to the relation which exists between the number of acre-feet of oil sand under its leases compared with the number of acre-feet of oil sand in the field as a whole.

13. Up to June 1, 1939, the field had produced approximately 1,365,000,000 barrels of oil. Of this amount, plaintiff's leases produced approximately 131,000,000 barrels, or only about 9.6 per cent of that portion of the original reserves which had been depleted

up to that time. Plaintiff has been permitted in the past to recover only 11/15 as much oil per acre-foot of its oil sand depleted as the field as a whole has been permitted to produce per acre-foot of sand depleted.

14. At the present time the amount of net oil sand under plaintiff's leases is at least 14.3 per cent of the total net oil sand now in the field; and it now has under its leases at least 14.3 per cent of the total remaining recoverable reserve of oil in the field.

V.

Comparative Drilling Densities in the East Texas Field.

15. The East Texas field has been drilled to an average density of one well to approximately 5.17 acres. Plaintiff's properties have been drilled to an average density of one well to about 5.8 acres. Properties in the field other than plaintiff's properties have been drilled to a density of one well to approximately 5.1 acres. While the Commission's rule which provides for well spacing, known as Rule 37, has been changed from time to time, more than 65 per cent of the wells completed in the field have been drilled under permits granted by the Commission in exception to the rule. Since early in 1933, a 10-acre spacing rule has been in force. There is no uniformity of spacing in the field. Many areas in the field have been very densely drilled; for example, on 109 acres, some 360 wells have been drilled to a density of 0.1 and 0.4 of an acre, or an average density of .3 of an acre per well. On 374 acres in the field, some

523 wells have been drilled to a density between .5 to .99 of an acre, or to an average density of .71 of an acre per well. On 2013 acres some 1336 wells have been drilled to a density of between 1 and 1.9 of an acre, or an average density of 1.5 acres per well. On 5637 acres some 2237 wells have been drilled to a density between 2 and 2.9 of an acre, or an average density of 2.5 acres per well. On 30,160 acres some 7331 wells have been drilled to a density between 3 and 4.9 of an acre, or to an average density of 4.1 acres per well. On 57,485 acres some 9879 wells have been drilled to a density between 5 and 6.9 of an acre, or to an average density of 5.85 acres per well. On 37,159 acres some 4128 wells have been drilled to a density of 7 acres or more per well, or an average density of 9 acres per well.

VI.

The Allowable Schedules and the Basis of Allocation Under Order of June 19, 1939.

16. The defendant Railroad Commission's statewide order of June 19, 1939, which became effective at 7:00 A. M., July 1, 1939, provided for an allocation of production on the basis of 2.32 per cent of the hourly potential capacity of the several wells in the field as determined by the Commission. Such hourly potentials were determined by taking potential tests on some seventy key wells. Using these wells as control points, contour lines of equal potential were drawn. Wells other than key wells, falling between the con-

tour lines, were then assigned potentials based on their relative positions with respect to the contour lines, whatever their actual potentials in reality may have been. Such a method of calculating or determining potentials necessarily involves the assumption, or finding, that relatively uniform conditions exist over wide areas adjacent to each key well. In connection with the proration order of June 19, 1939, the Commission issued its allowable schedule under which it fixed the daily allowable production for the various wells in the field, and issued a shutdown order, shutting down the entire field on certain specified days. These orders became effective July 1, 1939, and under their terms were to continue in effect until 7:00 A. M., October 1, 1939. From an examination of the schedules, it appears that the above proration order as construed, applied and administered by the Commission, allocated production among the various wells in the field, on the days on which the wells were permitted to produce, on substantially the following basis:

(a) The field allowable was approximately 521,500 barrels per day.

(b) Wells incapable of making 20 barrels per day, which were classed as marginal wells, were permitted to produce all of the oil they were capable of producing. There were some 559 wells so classified, and they produced approximately 6400 barrels per day.

(c) Wells capable of producing 20 barrels per day, or more, and to which the Commission

assigned hourly potentials of less than 865 barrels, were permitted to produce exactly 20 barrels per day. There were some 18,951 such wells to which were allocated approximately 379,000 barrels per day.

(d) Wells which were assigned an hourly potential of 865 barreels, or more, were permitted to produce 2.32 per cent of the assigned hourly potential. There were some 6300 such wells to which were allocated approximately 135,900 barrels per day.

To each non-marginal well was allocated 20 barrels per day. Only between 7000 and 10,000 barrels per day were prorated among the 6300 wells having more than 865 barrels hourly potential. The actual range of allowable was from 20 barrels to slightly less than 26 barrels per day. In substantial effect the order was a per-well order. Under said order and schedules, plaintiff was permitted currently to produce 9.93 per cent of the field allowable. Had plaintiff's allowable been based on comparative reserves, it would have been 44 per cent higher than it was.

Such allocation gave no separate consideration to acreage, sand thickness, bottom hole pressure, position on structure, the number of acre-feet of oil sand in a lease, or the recoverable reserves under a lease.

17. After a hearing before a statutory three-judge court on plaintiff's motion for preliminary injunction, the court found the order and schedules of June 19, 1939, unreasonable, confiscatory and void as to plain-

tiff, and on August 12, 1939, granted plaintiff a preliminary injunction, restraining defendants from enforcing said order and schedules against the plaintiff pending final disposition of this action on its merits, and permitting plaintiff to produce 144 per cent of the schedules allowable for each of its wells in the East Texas field. Plaintiff duly executed and filed the required bond which was approved by the court. Plaintiff produced oil for a few days under the terms of the preliminary injunction. It was stipulated on the trial of this action on its merits that the defendants would never seek to enforce against plaintiff any fines, penalties or forfeitures, or to take any other action against plaintiff because of its having produced oil from its wells in the East Texas field to the extent that it was permitted to produce under the terms of the preliminary injunction.

VII.

Allowable Schedules and Basis of Allocation under Orders of September 11 and September 29, 1939, and January 24, 1940.

18. The Commission's proration orders for the East Texas field of September 11 and September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith, are all substantially the same. Accompanying them were shut down orders, the shut down order of January 24, 1940, closing all wells in the East Texas field, except wells classed as marginal wells, for twelve days during the month of February, 1940.

19. The salient provisions of such proration orders and schedules are:

(a) They fixed a top allowable of approximately 691,000 barrels daily for the field.

(b) They allotted 20 barrels per day to each well capable of making that many barrels, or more. There were some 25,456 wells of this kind to which were allotted approximately 509,000 barrels per day under this particular clause of the order.

(c) To wells incapable of making 20 barrels per day they allotted what they could make. These wells were classed as marginal wells. There were some 514 such wells to which were allotted some 6245 barrels per day.

(d) The balance of the field allowable, amounting to about 176,000 barrels per day, was allocated among wells capable of making more than 20 barrels per day. Each such well received in addition to 20 barrels per day, an amount determined by multiplying the proratable oil, approximately 176,000 barrels per day, by a fraction whose numerator was the product of the well's hourly potential by its bottom hole pressure by the thickness of the saturated Woodbine sand underlying the well by the average number of acres per well in the lease, and whose denominator was the sum of such products for all of the wells in the field.

Thus, less than 1 per cent of the field allowable was allocated to so-called marginal wells. About three-fourths of the field allowable was allocated among wells on a flat per-well basis of 20 barrels per day, and about one-fourth of the field allowable was

allocated among those wells capable of making more than 20 barrels per day by use of the formula described in (d) above. All wells classed as non-marginal wells were permitted to produce only 17 days during February, 1940. The average actual daily allowable for the field and for the individual wells was reduced accordingly.

VIII.

Losses Sustained by Plaintiff under Existing Order and Schedules.

20. Following is a comparison of plaintiff's allowables under the order of June 19, 1939, and the order of January 24, 1940:

Field	*Plaintiff*	*Per Cent*
522,000 b/d	52,000 b/d	9.932%
691,000 b/d	77,000 b/d	11.17%

Plaintiff's increase due to increase in the top allowable for the field was 16,600 b/d, or 66 per cent of its total increase. Plaintiff's increase due to distribution under the formula in February order was 8,400 b/d, or only 34 per cent of its total increase, or about 9 per cent of its allowable.

21. While plaintiff owns at least 14.3 per cent of the remaining recoverable oil reserves in the field, as stated above, its current scheduled allowable is only 11.17 per cent of the current scheduled allowable for the field. Considering shut-downs, its current actual allowable is 11.11 per cent of the current actual al-

lowable for the field. On the basis of comparative reserves, and considering the position of plaintiff's properties on structure, because of which some will produce less and some more than the reserves under them at the present time, plaintiff is nevertheless currently deprived of an opportunity to produce 3.13 per cent of the field scheduled allowable or 3.19 per cent of the field's actual allowable. This amounts to a restriction of about 29 per cent on plaintiff's current allowable.

22. (a) As stated above, the flat allowable of 20 barrels per well per day consumes approximately 3/4ths of the field allowable, and only about 1/4th of the field allowable is apportioned among wells under the formula mentioned in paragraph 19(d). The poorer wells and properties, as well as the better wells and properties, share in this apportionment; that is, the poorer wells and properties are permitted to receive an allowable over and above the flat 20 barrel minimum. The discriminations comlained of result almost entirely from the use of the 20 barrel minimum. No good reason is shown why a minimum per-well allowable of 20 barrels per day is necessary. If the entire field allowable were apportioned in accordance with the factors mentioned in paragraph 19(d) with no per-well minimum, plaintiff's properties would be permitted currently to produce slightly in excess of 14.3 per cent of the current field allowable. It appears that, without using the per-well minimum, the factors employed can be given such values in a formula that a reasonable method of distribution can be effected.

(b) As a consequence of the method of allocation used, densely drilled leases in any part of the field receive much more allowable in proportion to reserves than neighboring leases less densely drilled; and leases in the eastern and western portions of the field, where the oil sand is relatively thin, are allotted much higher allowables in proportion to their reserves than are leases in the fairway where the oil sands are thickest and the reserves greatest. The so-called fairway properties, except those which are very densely drilled, are being and will be severely drained by the leases lying in the eastern part of the field. Under the existing order, or orders similar thereto, the less densely drilled areas and particularly leases in the fairway, are not afforded an opportunity currently to recover their fair share of the oil, and probably will not ultimately be afforded an opportunity to recover substantially the equivalent of the recoverable reserves under them; while the densely drilled leases and leases particularly in the eastern portion of the field are currently afforded an opportunity to recover far in excess of their fair share, and ultimately will probably be afforded an opportunity to produce far in excess of the equivalent of the reserves underneath them.

(c) Under open flow conditions, properties in the fairway would have a distinct advantage over properties on the west side and properties on the east side of the field in enjoying recoveries in comparison with reserves. This is because, under open flow conditions, water would rapidly encroach and flood the oil sands on the west, and pressures would rapidly decline in the

eastern portion of the field, while in the fairway water encroachment and pressure decline would be delayed. No sufficient explanation has been given as to why it is necessary, under conditions of control, to restrict fairway properties and wells and to favor west side and particularly east side properties and wells in such manner as to bring about the result complained of by plaintiff.

23. Under the orders and schedules complained of by plaintiff, assuming that the wells on tracts adjacent to each other have identical potentials, pressures, sand thickness, and reserves, a 5-acre lease with five wells on it on the west side of the field would be permitted to produce about 5 times as much oil per day as an adjoining 5-acre lease with only 1 well on it; a 5-acre lease in the fairway with 5 wells on it would be permitted to produce about 3 times as much oil per day as an adjoining 5-acre lease with 1 well on it; a 5-acre lease on the east side of the field with 5 wells on it would be permitted to produce about 5 times as much oil per day as an adjoining 5-acre lease with 1 well on it. This is representative of what actually takes place. Moreover, most leases on the west side and practically all, if not all of the leases on the east side of the field are permitted to produce several times as much oil per day in comparison with reserves as are leases in the fairway, excepting those fairway leases which are very densely drilled.

In general, this results in severe drainage from leases in the fairway to leases in other parts of the field, or, to put it another way, the result is that, in

general, leases in the fairway are not permitted to obtain current, and may not obtain ultimate, recoveries on a basis comparable to recoveries permitted to leases in other parts of the field. Plaintiff's leases, for the most part, are located in the fairway, and this accounts in a large measure for the severe drainage that its leases are currently suffering under the existing orders and schedules, and will probably ultimately suffer if such orders and schedules are maintained in force.

24. The arbitrary allocation of about three-fourths of the field allowable on a flat per well basis of 20 barrels bears no relation to the prevention of physical waste, and is not justified by the necessities of the case.

IX.

Plaintiff Has Enough Wells

25. Plaintiff having drilled its leases to an average density of approximately one well to 5.8 acres, already has more than enough wells to recover efficiently and effectively, without waste, the recoverable oil in its leases, and to produce its proper share of the allowable production. One well will effectively drain more than 10 acres on each of plaintiff's leases, and already it has drilled each of its leases to a density of less than 10 acres. The main factor working for prevention of waste in the East Texas field is the maintenance of a top allowable not materially exceeding the present figure with respect to total liquids produced. The per-well method of dis-

tribution tends to cause waste as a result of concentration withdrawals where drilling is dense.

X.

Drilling and Production Costs in the East Texas Field.

26. It costs about $10,000.00 to drill and equip an oil well in East Texas field. It costs about $2500.00 to equip a well with pumping equipment. Most pumping wells in the East Texas field can be operated at a profit on a daily production of as little as 5 barrels each. Many pumping wells in the field have been operated over a period of years on an average production of less than 5 barrels per day. A few pumping wells, if producing large quantities of water, may not be able to operate at a profit if producing no more than 5 barrels of oil per day; but if such wells were closed in, practically all, if not all, of the recoverable oil in the tracts on which such wells are located could be produced by other wells, and no substantial waste would result from the abandonment of such wells. Flowing wells in the East Texas field can be operated at a profit on less than 5 barrels per day average production.

27. Practically all wells in the field have been drilled more than two years, and have produced more than a sufficient amount of oil to pay for the cost of drilling, equipping and operating such wells. Some of the wells drilled within two years from this date have doubtless paid out, while many of the wells

drilled less than two years ago have in a large measure paid out.

XI.

Efforts of the Plaintiff to Obtain Relief from the Commission.

28. Plaintiff has repeatedly and diligently endeavored to obtain administrative relief from the Railroad Commission of Texas, and to secure an adjustment of the allowable for its wells in the East Texas field in such manner as to afford it an opportunity currently and ultimately to produce its fair share of the oil from the field. In spite of such efforts the defendant Commission has failed and refused to grant to plaintiff the relief sought.

XII.

Confiscation and Irreparable Injury.

29. The program of regulation outlined above results in the taking of plaintiff's property and giving it to others, without any compensation and without any reasonable necessity. Plaintiff is deprived of a reasonable opportunity to produce currently a very substantial quantity of oil which it would be entitled to produce under a proper method of regulation. The loss to plaintiff under such a program amounts to a very large figure daily, and will probably amount to an enormous figure over a period of years if the program be continued. Even if plaintiff should be authorized to drill additional wells in an effort to

increase its percentage of allowable production, and even if plaintiff should elect to drill such wells, it is mere speculation to say that its allowable would be materially increased, for it is reasonably certain that other operators would likewise be given permits to drill, and the result would be nothing more than further useless expenditure for wells, with little or no relative change in the distribution of the allowable as far as plaintiff is concerned. Since plaintiff already has enough wells to produce efficiently its allowable, should it be required to drill additional wells as a prerequisite to obtaining its proper allowable, confiscation would result to the extent of the unnecessary expenditure. There is nothing in the orders or program of the Commission which even suggests that the losses already incurred by plaintiff, and to be incurred by the present program, can or will be offset by increasing the allowable of the plaintiff in the future in order to make up for any losses which have occurred or may hereafter occur.

30. The regulation by the Commission does not allocate or distribute the allowable production for the field on a reasonable basis, and is arbitrary, discriminatory, confiscatory, and unreasonable as applied to plaintiff. It denies to plaintiff a reasonable opportunity to recover its fair share of the oil ultimately, much less within a reasonable time, resulting in a daily loss of many thousand barrels of oil worth many thousand dollars.

B.

Conclusions of Law.

In view of the facts found above, concerning which there really is little or no dispute in the evidence, the following conclusions of law are applicable:

1. This court has jurisdiction of the persons and subject matter involved in this action.

2. Subject to the interests of its royalty holders, plaintiff is the owner of the oil and gas in place under its leases in the East Texas field.

3. As the owner of its several leases in the East Texas field, the plaintiff is legally entitled currently and ultimately to produce its fair share of the oil produced from the field.

4. Under the statutes of Texas, Articles 6023, 6029 and Section 7 of Article 6049-c, Vernon's Annotated Revised Civil Statutes, the Railroad Commission is the administrative agency charged with the duty of preventing waste; and in administering the conservation statutes is required to apportion or allocate production of oil among properties in each field "on a reasonable basis."

5. The order of the Commission of June 19, 1939, for the East Texas field, and the schedules issued in connection therewith, as interpreted, applied and enforced against plaintiff, were unreasonable and void as to plaintiff. They did not afford to plaintiff an opportunity to recover its fair share of the oil. As to plaintiff they did not allocate the production in the field on a reasonable basis as required by the Texas

statutes; and they deprived plaintiff of its property without due process of law and denied to it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

6. The orders of the Commission of September 11 and September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied and enforced against plaintiff (such orders and schedules being often referred to herein as the Commission's program of regulation for the field) are unreasonable, discriminatory, confiscatory and void as to plaintiff. As to plaintiff, they do not allocate the production in the field on a reasonable basis, as required by the statutes of Texas referred to in the preceding paragraph.

7. The program of regulation complained of by plaintiff does not within reasonable limits protect the property rights or privileges of plaintiff; it does not give to plaintiff the opportunity to produce currently its fair share, or prevent reasonably avoidable drainage of its properties considered as a whole, although plaintiff has more than enough wells already drilled on its properties from which its fair share can be produced without waste. To require plaintiff to drill any further or additional wells upon its properties would be to require plaintiff to make unnecessary and wasteful expenditures of money and, in itself, would be a confiscation of plaintiff's property.

8. Such program of regulation operates to confiscate plaintiff's property, and unreasonably discriminates against plaintiff, contrary to the due process

and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; and such program of regulation is void as far as plaintiff is concerned. It is not necessary to prescribe and enforce such a program of regulation against plaintiff in the East Texas field in order to prevent physical waste of oil and gas, or for any other reason.

9. Plaintiff is currently suffering immediate and irreparable injury under such program of regulation, and, so long as such program is maintained in force and effect, will continue to suffer irreparable injury, unless the defendants are enjoined from enforcing such a program of regulation against plaintiff in the East Texas field. Plaintiff is without an adequate remedy at law to protect itself against losses which have occurred and which will continue to occur under the program of regulation now in vogue. Furthermore, the Texas Statutes (Acts of 1935, 44 Leg., Reg. Sess., p. 180, c. 76, Sec. 14; Sec. 8 of Article 6049c of Vernon's Annotated Revised Civil Statutes of Texas) apparently recognize that no adequate remedy at law exists in such an instance, for the statutes specifically authorize a suit for injunction against the Commission and the members thereof in a court of competent jurisdiction in Travis County, Texas, by any interested person affected, for the purpose of testing the validity of any statute, rule, regulation or order relating to the conservation of oil and gas. This court is a court of competent jurisdiction in Travis County, Texas.

10. The marginal well statute (Acts of 1931, 42nd Leg., Reg. Sess., p. 92, C. 58; Article 6049b of Ver-

non's Annotated Revised Civil Statutes of Texas) is not patently invalid. Since it appears that less than 1 per cent of the total daily allowable production from the field is allotted to marginal wells as defined by the Commission, the court finds it unnecessary to pass upon the validity of said marginal well law. There is nothing, however, in the marginal well law which requires the Commission to use the method of distribution and program of regulation now in vogue, or which prohibits the Commission from limiting non-marginal wells below the minimum allowable applicable to true marginal wells as defined by the statute.

11. The Texas statute, cited in Section 9 of these Conclusions of Law, provides that any interested person who is dissatisfied with the effect upon him of any statute, rule, regulation or order relating to the conservation of oil or gas may institute suit for injunction to test the validity of such statute, rule, regulation or order. The statute does not require that the complaining party first seek relief from the Commission, with respect to its acts which are claimed to be invalid, as a prerequisite to the seeking of an injunction. Furthermore, if the statute be properly interpreted to mean that relief should first be sought from the Commission, and even conceding that, as a general rule, relief from a court should not be sought if the same relief could promptly be obtained by application to the administrative agency (Commission in this instance), then it appears that plaintiff, an interested person, has already sought such relief from the

Commission and has fully exhausted its administrative remedy without obtaining relief.

12. The record shows virtually no dispute as to the facts. The law being clear as applied to such facts, the court finds that an injunction should issue, substantially as prayed for by plaintiff enjoining defendants from enforcing, or attempting to enforce, the orders and schedules complained of against plaintiff or its properties in the East Texas field, or from suing for or otherwise attempting to claim or collect penalties, or to enforce forfeiture, or in any other manner to penalize plaintiff or the oil produced as set forth in the final judgment to be entered in this action as directed by the court.

The final judgment is directed accordingly.

Done as of date March 17, 1940.

SAML. H. SIBLEY,
Circuit Judge,
JAMES V. ALLRED,
District Judge,
ROBERT J. MCMILLAN,
District Judge.

ENDORSED: IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION HUMBLE OIL & REFINING COMPANY, PLAINTIFF VS. RAILROAD COMMISSION OF TEXAS ET AL, DEFENDANTS. CIVIL ACTION NO. 31 FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED 20th DAY OF MARCH, 1940. MAXEY HART, CLERK, BY JOE STEINER, DEPUTY.

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